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No. 90-777

In the Supreme Court of the United States

OCTOBER TERM, 1990

JERRY LEE HARVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the government did not violate an informal immunity agreement with petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 900 F.2d 1253. The prior opinion of the court of appeals (Pet. App. B1-B11) is reported at 845 F.2d 760.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1990, and a petition for rehearing was denied on May 17, 1990. Pet. App. C1. On August 30, 1990, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to October 14, 1990. The petition was filed on October 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of conspiracy to defraud the United States by impeding the Internal Revenue Service in its lawful functions of ascertaining, computing, assessing, and collecting income taxes, in violation of 18 U.S.C. 371. Pet. App. A6; C.A. App. 1. He was sentenced to a five-year term of imprisonment and a $10,000 fine. Pet. App. A6. The court of appeals affirmed. Pet. App. A1-A23.[1]

1. The evidence showed that beginning in 1982, petitioner purchased several jet aircraft through broker Dennis Patrick McCartan.[2] At petitioner's request, McCartan sought to include large amounts of cash in the payments petitioner made in connection with some of those purchases. Vollrath Company, a seller of jet aircraft, notified the FBI when McCartan approached it, asking the company to sell a Lear jet to petitioner for "125 thousand dollars in under-the-table money." Pet. App. A8. Subsequent negotiations among Vollrath, McCartan, and petitioner were tape-recorded with Vollrath's consent. Eventually, petitioner agreed to pay $140,000 for the airplane, $60,000 of which was to be paid in cash. The closing of the sale was witnessed by an FBI undercover

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[1] The government had sought an enhanced sentence under the dangerous special offender statute, 18 U.S.C. 3575 (1982). Although that statute has been repealed, proceedings under it are saved by 1 U.S.C. 109. Pet. App. A9 n.2. The court of appeals reversed the district court's summary denial of the government's request for an enhanced sentence, and it remanded the case for a hearing to determine whether enhancement is appropriate. *Id.* at A11-A14. Petitioner does not challenge that ruling here.

[2] McCartan was indicted as a co-conspirator, but he entered into a plea agreement and testified against petitioner at trial.

agent in January 1983. In November 1983, petitioner asked McCartan to confirm with Vollrath whether the "documented price" was to be $80,000 or $85,000, "just in case somebody ever[] checks." *Ibid.* Petitioner reported a purchase price of $80,000 on his corporation's income tax return, omitting any mention of the additional $60,000. In taped telephone conversations during 1985, petitioner confirmed that he and McCartan had coordinated the reporting of the $80,000 figure to the IRS. *Id.* at A8-A9.

2. Petitioner was tried and convicted in 1987. Pet. App. B3-B4. His original conviction was reversed on the ground that the district court had erroneously admitted certain evidence of "uncharged drug activities and related monetary gains during the ' '60s and '70s.' " *Id.* at B9-B10. At the retrial, that evidence was not admitted. See *id.* at A21-A22.

Both at his first trial and on retrial, petitioner claimed that the charge itself, the grand jury proceedings, and certain evidence admitted against him violated an informal immunity agreement he entered into in 1980 with the United States Attorney in Mobile, Alabama. Pet. App. A9. Neither the agreement nor the information petitioner provided pursuant to it was reduced to writing. *Id.* at A14. However, as the Eighth Circuit noted in this case (*id.* at A14-A15), a district court in Florida subsequently found that petitioner was given both use and transactional immunity in the informal agreement with the government in 1980. *United States* v. *Harvey*, 651 F. Supp. 894 (S.D. Fla. 1986). Although the Eleventh Circuit, sitting en banc, ultimately reversed the decision of the Florida district court insofar as it dismissed counts in that case charging violations that occurred after the 1980 agreement, it upheld the finding that petitioner had been granted both use and transactional immunity. *United States* v. *Harvey*, 869 F.2d 1439, 1446 (1989).

Prior to the first trial in this case, the government disclosed its evidence to petitioner. Based on petitioner's concession that the material did not appear to have been obtained or derived from immunized statements, the district court determined that petitioner's request for a hearing under *Kastigar* v. *United States*, 406 U.S. 441 (1972), concerning the use of his immunized testimony was moot. Pet. C.A. App. 149-150, 172. Prior to petitioner's second trial, the district court overruled his renewed immunity objections. It reasoned that any transactional immunity granted in 1980 would be irrelevant to a conspiracy that began in 1982, and after reviewing the grand jury minutes, it found that no immunized information had been presented to the grand jury. Pet. App. A9.

3. On appeal, petitioner contended, *inter alia*, that the district court had erroneously allowed the government to use information about incidents for which petitioner had received a "plea-bargained promise of 'complete immunity' " in the investigation and prosecution of the case. Pet. C.A. Br. 24-33. Following the reasoning of the Eleventh Circuit's en banc decision, the court below held that any transactional immunity petitioner received in 1980 was irrelevant to a prosecution for a tax conspiracy that began in 1982. Pet. App. A20 (citing 869 F.2d at 1445-1448). The court below also found that there had been no violation of petitioner's grant of use immunity. In rejecting petitioner's contention that the prosecutor had improperly referred to "offshore cash" in closing statements, the court of appeals pointed out that the government had shown sources independent of any information petitioner might have revealed in 1980 concerning his financial transactions. Similarly, the court of appeals concluded that the district court's findings that immunized

testimony had not been presented to the grand jury were not clearly erroneous. Pet. App. A20-A21.[3]

ARGUMENT

Petitioner contends (Pet. 11) that the decision below conflicts with *Kastigar* v. *United States*, 406 U.S. 441 (1972), which held that a statutory grant of use immunity, as distinguished from transactional immunity, is sufficient under the Self-Incrimination Clause of the Fifth Amendment to permit the government to compel testimony from an individual. Petitioner's submission in this case extends beyond *Kastigar*, however, because he argues that he was granted both transactional and use immunity in 1980 and that both forms of immunity were violated in this case. Moreover, because petitioner's claim of immunity derives from an agreement he voluntarily entered into with the United States Attorney in Alabama, rather than from a statutory grant of immunity as a precondition to compelling his testimony, his claim here ultimately must rest on the scope and enforceability of that particular agreement, not on the Self-Incrimination Clause and this Court's construction of that Clause in *Kastigar*. See *United States* v. *Harvey*, 869 F.2d at 1443-1444; cf. *Mabry* v. *Johnson*, 467 U.S. 504 (1984). In any event, the court of appeals correctly rejected petitioner's contentions.

1. Contrary to petitioner's suggestion (Pet. 13-16), there was no violation of any agreement to confer transactional immunity on petitioner in 1980. Transactional

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[3] The court of appeals also declined to consider petitioner's claim that a violation of his grant of use immuity occurred at his pretrial detention hearing, noting that even if that claim was correct, it would not require reversal of his conviction. Pet. App. A21.

immunity "accords full immunity from prosecution *for the offense to which the compelled testimony relates.*" *Kastigar* v. *United States*, 406 U.S. at 453 (emphasis added). Because the conspiracy at issue here commenced in 1982, it cannot be an offense to which the information petitioner gave the government in 1980 "relates." Petitioner furnishes no authority supporting a contrary conclusion. In fact, petitioner characterizes the instant prosecution as an "unrelated case" (Pet. 21), and he does not even address the holdings by the Eighth Circuit in this case (Pet. App. A20) and the en banc Eleventh Circuit in *United States* v. *Harvey*, 869 F.2d at 1445-1448, that any transactional immunity he received in 1980 does not extend to prosecution for an offense that began after 1980. Because the decision below is consistent with the ruling by the Eleventh Circuit on the precise question of the scope of petitioner's transactional immunity, and because, as petitioner concedes (Pet. 14), issues concerning transactional immunity do not arise with much frequency after *Kastigar* and the enactment of statutes conferring only use immunity, no further review is warranted.

2. There likewise was no violation of petitioner's grant of use immunity. As he did in the court of appeals, petitioner asserts (Pet. 17-20, 22), without citation to the record, that the government used immunized information in deciding to bring the prosecution, presenting the case to the grand jury, and questioning witnesses. The court of appeals properly rejected that contention. Pet. App. A20-A21.[4]

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[4] Contrary to petitioner's assertion, the court of appeals clearly recognized that the government had the burden of showing that the prosecution was based on sources independent of the immunized information. See Pet. App. A16-A17 (where the defendant claims that evidence violates use immunity, the "burden is on the government to demonstrate a source independent of the immunized testimony"); *id.*

As the court of appeals noted (Pet. App. A9, A21), the district court considered evidence offered by petitioner, and it reviewed the grand jury testimony *in camera*. That review provided an ample basis for the district court, affirmed by the court of appeals, to reject petitioner's claim that the indictment was based on immunized evidence. Pet. C.A. App. 355-356, 380; Pet. App. A21. Traditionally, this Court has been reluctant to disturb findings of fact in which two lower courts have concurred. *United States* v. *Doe*, 465 U.S. 605, 614 (1983). Nothing here suggests a departure from that practice, since petitioner points to nothing in the record to demonstrate that the findings below are unsupported by the record.

In addition, the court of appeals had a sufficient basis for determining that the government had independent sources for the information regarding petitioner's funds in foreign bank accounts. As the court pointed out (Pet. App. A20-A21), McCartan and Irene Hudak, who had prepared petitioner's income tax forms in 1983, testified that petitioner had told them of an account he held in the Cayman Islands.

Finally, the prosecutor informed the courts below that, although he was exposed, through petitioner's pleadings, to information relating to the grant of immunity, he did not learn what petitioner allegedly had told DEA agents in 1980. See Gov't C.A. Reply Br. 22-23, 44. Thus, the record does not support petitioner's claim (Pet. 18-19) that the prosecutor exploited immunized information in questioning witnesses.

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at A20-A21 (pointing out, with regard to petitioner's claim that the prosecution used immunized evidence of his offshore transactions, that "the government showed sources independent of any information [petitioner] may have revealed to drug agents in 1980").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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